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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1494

UNITED STATES OF AMERICA, *Petitioner*

vs.

100 ACRES IN MARIN COUNTY, CALIFORNIA
DRAKE'S BEACH ESTATES, INC., *Respondent*

BRIEF OF DRAKE'S BEACH ESTATES IN OPPOSITION TO THE AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY THE UNITED STATES OF AMERICA

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Subject Index

	Page
Statement of the case	1
Argument	6
Boundary line agreements available	7
Exchange agreement available	8
Public trust concept not controlling	8
Relevant and admissible evidence	9
Summary	11
Conclusion	12

Table of Authorities Cited

Cases

	Page
Dawes v. Silberman, 185 Misc. 335, 56 N.Y. Supp. 2d 902	6
Gem Stores Inc. v. O'Brien, 374 S.W.2d 109	6
Keating v. State (Fla. App.) 157 S.2d 567	6
Knetsch v. United States, 364 U.S. 361 (1960)	6
Marks v. Whitney, 6 C.3d 251 (1971)	8
McCandless v. United States, 298 U.S. 342 (1936)	9
Olson v. United States, 292 U.S. 246 (1934)	9
St. Joe Paper Co. v. United States, 155 F.2d 93 (CA 5, 1946)	11
State, by Clark v. Applebaums Food etc., 259 Minn. 209, 106 N.W. 2d 896	6
United States v. Reynolds, 397 U.S. 14 (1970)	2
United States v. Waterhouse, 132 F.2d 699 (C.A. 9, 1943), affd, 321 U.S. 743 (1944)	9

Codes

Public Resources Code, Section 6357	7

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STATEMENT OF THE CASE

In the State of California's Amicus Curiae brief,[1] purportedly in support of the Petition for Writ of Certiorari filed by the plaintiff United States, the State urges this Court to consider certain questions.

(State's Amicus Curiae brief, pages 2 and 3). These questions have not been raised by either the United States or defendant Drake's Beach Estates, the only two parties involved in this proceeding.[2]

The questions framed by the State of California are essentially evidentiary. In presenting its questions the State ignores the record and a multitude of pertinent facts. For this reason, the following summary of facts attempts to highlight the more important points in the record not set forth by the State in its statement of the case.

The owner presented evidence that there were four alternative plans for development of the subject property. All four of these alternatives were presented to the jury. Only one of them related to the availability of some type of cooperation or agreement between Drake's Beach Estates and the California State Lands Commission.[3]

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[1]On January 29, 1964, the State of California filed its disclaimer of any interest in this action. (Findings of Fact, App. A of Petition, page 26a; CT 44). Thus the State voluntarily withdrew itself as an active party from this case.

[2]The question presented by the United States is whether questions of State policy should be tried by the trial judge or the jury. *United States v. Reynolds*, 397 U.S. 14 (1970). The United States does not take the position, as does the State, that such matters are precluded from consideration in an eminent domain case. (Petition, page 3).

[3]The owner's basic position was that its property consisted of 212 acres, and State cooperation on any subject would not be required. (RT 1601-1606, 1630-1631, 1999-2000, 2121).

There is also evidence that even if the property was as little as 148 acres, as urged by Government, it could still be developed without State cooperation.

Drake's Beach Estates also presented evidence that ample fill material was available from at least two sources other than the dredging of State lands. (RT 1637-1642, 1739).

The jury's verdict and the judgment in this case need not be based upon any evidence elicited through the testimony of Mr. Nadey, a State employee. The judgment can be founded upon other considerations.

As to only one of these four plans did the owner offer evidence of a reasonable probability of an agreement with the State and that such an agreement was beneficial and logical for both the State and the owner. As of the date of taking in this case, October 23, 1963, ecological considerations were not in vogue and were not a primary consideration by the State Lands Commission. The primary State considerations in 1963 favored man-made recreational uses. The State of California Department of Fish and Game in January of 1963 took the position that these tidelands had ". . . little value for clams and oysters . . . ." (RT 3567) The State Lands Commission was more concerned with aiding navigation, including recreational boating, and commerce. The evidence in this case shows that the dredging of the State's channel would have improved recreational boatways, and at the same time, permitted royalties to the State for the soil removed. (RT 2038-2039).

Evidence of State policy and the reasonable probability of such availability of State owned tidelands for use in conjunction with the Drake's Beach Estates' property was presented through certain documentary evidence and several witnesses. Mr. Nadey was not the sole witness who testified regarding these matters.

The evidence of reasonable probability was admissible on several grounds: (1) It was relevant to market value as a factor an informed buyer and seller would consider; (2) It was relevant to refute the Government's contention that the propertys' size and dimensions precluded its adaptability to its highest and best use and thereby its market value; (3) It was relevant to feasibility of such use as it relates to market value.

In this case, Drake's Beach Estates presented substantial evidence showing that in all likelihood the State would enter some type of mutually beneficial cooperation agreement.

As foundation for this opinion the evidence in this case shows: the State's motivation for entering such agreements (RT 1982, 1993-1994, 2042-2043); the nature of the rights and the manner in which they were to be secured (RT 1976, 1980, 1984-1987, 2025, 2116); the nature of the work to be performed (RT 1621); the legal and practical availability of an agreement (RT 1973-1974, 2025); examples of and frequency of approval by the State of seventy similar transactions (RT 1988-1993, 1635); the cost and feasibility of development under an agreement (RT 1431, 1542, 1553, 1560); cost of other alternative methods of development (RT 1430-1432, 1637-1642, 1726-1731, 1739); as well as the reasonable probabilities of State consent to such an agreement being obtained (RT 1356, 1621, 2027, 2033, 2036-2038, 2094).

The testimony of Mr. Nadey was calculated to focus upon the reasonable probability of the State's entering

some type of cooperative agreement with Drake's Beach Estates for the benefit of both the State and Drake's Beach Estates. It was never proposed that Mr. Nadey's testimony would bind the State or the jury in its deliberations. It was merely some additional evidence bearing upon size, adaptability and market value. The testimony was not presented to the jury in such a fashion that it was compelled to conclude that an agreement would be reached between Drake's Beach Estates and the State. The evidence merely presented to the jury another reasonable consideration which a buyer and seller in the open market would weigh when purchasing and selling the subject property.

It seems only fair that this Court should be apprised of the fact that the State through its Attorney General was present at trial during the testimony of Mr. Nadey. The Court invited the State's attorney to participate in the trial. However, the State chose not to participate and object to the testimony of Mr. Nadey regarding State considerations in 1961 through 1963 on any basis, much less the basis now raised, that one State paramount consideration made dredge, fill, boundary line agreements or exchange agreements unavailable. Nor could they. Specific State law authorized them and Mr. Nadey, based on his own experience in administering these laws, stated his opinion as to how they would be applied by the State as they might affect the subject property. The only objections urged by the State were preliminary objections, one based upon privilege and the other based upon the compe-

tency of the witness. These are obviously matters for the trial court's determination.

ARGUMENT

Having disclaimed (CT 44) and having refused to participate at trial the State should be deemed to have waived any right to appear at all.

The State is not a party. Thus the State may not raise issues different from or new, relative to the questions raised by the parties.

We therefore have no reason, nor has the Supreme Court, to consider a point made in an Amicus Curiae Brief but not advanced in argument by the petitioner. *Knetsch v. United States,* 364 U.S. 361 (1960). An Amicus Curiae may not introduce new questions; only the questions presented by the parties may be considered. See also: *Dawes v. Silberman,* 185 Misc. 335, 56 N.Y. Supp. 2d 902; *State, by Clark v. Applebaums Food etc.,* 259 Minn. 209, 106 N.W. 2d 896; *Keating v. State* (Fla. App.) 157 S.2d 567; *Gem Stores Inc. v. O'Brien,* 374 S.W.2d 109.

Furthermore, the questions the State attempts to raise are very narrow matters dealing with evidence having to do with State of California statutes and local laws. They have no nationwide or constitutional significance and do not deal with federal questions, but rather with local matters.

BOUNDARY LINE AGREEMENTS AVAILABLE

The State *concedes* its first point by admitting the State is authorized to enter into boundary line contracts, under California Public Resources Code, Section 6357, particularly where artificial conditions were present. Also, there was testimony that in practice the State interpreted this section to authorize agreements where artificial conditions were threatened but had not yet occurred.

Whether the State tidelands boundaries were in a state of nature or whether this owner could have caused artificial conditions, or whether but for this action they would have been in 1963 but for the effects of this project in 1962, are *questions of fact* on which there was *substantial evidence* to support the owners position.

Nor does Finding 15 preclude this evidence. Finding 15 deals with and relates to *title*. Conclusive against these State arguments, in no way does Finding 15 deal with the prospect in 1963 of future artificial changes, nor with hypothetical circumstances in 1963 had not the Government's project stopped the subdivision in 1962.

As to "straightening" a boundary, the record shows the parties were merely using an expression of convenience. What was meant by this term was an "exchange" of areas, equivalent in value resulting in a "straightening" of a meandering shoreline boundary.

The distinction between an artificial or a natural state of a tidelands boundary is not necessary to support the judgment. If either an exchange agreement

or a boundary line agreement was available, the State's position fails.

EXCHANGE AGREEMENT AVAILABLE

The State also concedes that as a matter of local law, the State is authorized to enter into exchange agreements. Thus the State concedes its second point.

Without authority, the State argues that an exchange can occur only under "stringent conditions." On the record, the evidence is to the contrary. The numerous transactions, the frequency of state approval of dredging of other similar tidelands, the agreements and practices of the State in 1961-63 all disprove the State's contentions.

All the law, including the recent case of *Marks v. Whitney,* 6 C.3d 251 (1971) establish that the State can exchange its tidelands.

PUBLIC TRUST CONCEPT NOT CONTROLLING

In the face of clear statutory authority and expert testimony (from its own expert and others), the State illogically contends that the public trust as to State tidelands ("not to permit impairment of navigation, commerce or fishery", State's Amicus Curiae brief, page 7) would have operated to prevent dredging.

The record shows that the Public Trust concept was not limiting a factor in the various tidelands transactions described in the record.

This is evidenced by the high number of these types of boundary line and exchange agreements throughout the San Francisco Bay Area and along this portion of the California coast. These are concrete facts, not vague generalizations as to considerations erroneously labled by the State as "policies".

On its face, dredging to improve navigation is not inconsistent with the public trust not to impair navigation. That it was not considered inconsistent is apparent from the State's agreements and activities during that time.

RELEVANT AND ADMISSIBLE EVIDENCE

Of course, what is pertinent here is that opinion evidence as to reasonable probabilities of an exchange or other agreement with the State is relevant and admissible for the jury to consider in determining market value and use. *McCandless v. United States,* 298 U.S. 342 (1936); *United States v. Waterhouse,* 132 F.2d 699 (C.A. 9, 1943), affd, 321 U.S. 743 (1944); *Olson v. United States,* 292 U.S. 246, 255 (1934). Such evidence was further relevant to refute the United State's contention that the property was not adaptable. Since there was ample evidence that the subject property could be developed in several ways which did not rely on reasonable probabilities evidence at all, the judgment is fully supported without this evidence.

The trial judge determined that there was an ample foundation in law and fact for the prospects of an agreement. He heard the witnesses' qualifications. He

determined there were sufficient foundational facts for their opinions.

The jury was given this opinion evidence in the framework of what an informed buyer and seller would want to consider in the open market in determining fair market value. The witnesses testified as to their opinions, and evidence was considered in the light of the facts and reasons tending to support or refute such opinions. There is nothing in the record to indicate the jury did not carry out the trial judge's express instruction that these factors should be considered to the extent they would affect market value.

The weight of specific evidence (e.g. the existence of cancellable clam, oyster and eel grass allocations and preserves) as contrasted to the weight of other evidence (State admission that areas to be dredged were of little value for clams and oysters) is argument for the jury.

That ecological concerns were "vital" in 1963 is clearly unsupported in the record. Such an argument properly goes to the weight, not admissibility, of evidence.

The State takes the position in its Amicus Curiae brief that Mr. Nadey was a minor staff member of the State Lands Commission, with little authority. However, the record in this case shows Mr. Nadey was certainly qualified to testify regarding State policies and procedures in this area.[4]

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[4]Mr. Nadey was the only State employee in northern California at that time making recommendations as to boundary line agreements and dredging permits. (RT 2036). The Lands Commission

The qualifications required of an expert before he may give an opinion is a question for the trial judge and his decision thereon is conclusive, unless clearly erroneous as a matter of law. *St. Joe Paper Co. v. United States,* 155 F.2d 93, 96 (CA 5, 1946). In this case the Court of Appeals accurately observed that:

> "The trial court, in its discretion, properly decided the witnesses were competent to testify and apparently found that a sufficient foundation had been shown for such [opinion] testimony." (Petition, App. A, page 12a).

The Court of Appeals has found there was *substantial evidence* to support this judgment.

SUMMARY

The State concedes its entire position when it admits the boundary and exchange agreements are permitted under California law. Beyond this, the State's arguments invade the discretion of the trial court to determine the admissibility of evidence and the province of the jury to weigh the evidence. There was substantial evidence on all the factual points raised by the State.

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had rarely (if ever) failed to accept his recommendations on boundary line agreements. (RT 2037). He was familiar with the subject property (RT 1974-1975) and, in fact, he had reviewed a dredging application on an adjacent lagoon. (RT 1995-2001). He was also the draftsman of certain State of California statutes and procedures regarding tidelands, filling and related matters. (RT 1987).

CONCLUSION

Drake's Beach Estates respectfully requests that the Petition for Writ of Certiorari requested by the United States of America be denied.

Dated, San Francisco, California,
June 11, 1973.

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